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for an individual claim. Individual suits would have been economically impractical, and the lack of an economically viable means would effectively exculpate the company from liability, allowing it to reap unjustly a substantial economic windfall. The court quoted *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), for the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. Proceeding in a class action eliminates the possibility of repetitious litigation, provides claimants

with a method of obtaining redress for claims too small to warrant individual litigation, and prevents an unscrupulous wrongdoer from retaining the benefits of wrongful conduct. Controversies involving widely used contracts of adhesion present ideal cases for class adjudication; the contracts are uniform, the same principles of interpretation apply, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party. Here, Insight's customers were 'weaker' parties required to submit to the exculpatory clause, and accordingly, the rule that such provisions not be enforced is applicable.

MISCELLANEOUS

JUDGE CANNOT REQUEST "VOLUNTEERS" FOR LONG JURY TRIAL

Ford Motor Co. v. Duckett, ____ So. 3d ____ (Ala. 2011).

FACTS: Latoya Duckett was severely injured when the sport utility vehicle in which she was a passenger rolled over and ejected her from the backseat. She sued Ford Motor Company, alleging a strict liability design defect claim and a negligence claim. Before jury selection began, the trial judge noted that the trial could take anywhere from two to four weeks. Over the objections of Ford's defense counsel, the trial judge asked the prospective jurors to indicate who among them could serve for that length of time. The members of the venire who raised their hands were brought into the courtroom, and the jury was selected from that reduced group. The case was tried and the jury returned a verdict of \$8.5 million for Duckett on the strict liability claim and for Ford on the negligence claim. Ford sought a new trial on the basis that the trial court violated the statutory requirement of random jury selection by asking for volunteers to serve for a lengthy trial. The trial court denied the motion.

HOLDING: Reversed and remanded.

REASONING: Alabama Code § 12-16-55 mandates that "all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court."

In this case, although the original jury pool was randomly selected in accordance with the statute, the court found that the trial court reduced the original jury pool in a manner that violated the statutory requirement of random selection – asking who could serve on the jury for three or four weeks amounted to a request for volunteers. Such a request constituted a violation because it improperly introduced a subjective criterion for jury service not authorized by the statute. As in *United States v. Branscome*, the selection of volunteers results in a non-random selection process, which violates lawmakers' intent that "random selection be preserved throughout the entire selection process." 682 F.2d 484 (4th Cir. 1982).

The request for volunteers also negated the statutory mandate of random selection by providing the prospective jurors with complete discretion whether or not to serve. Allowing people to decide whether they wish to perform a particular task is the opposite of randomly selecting those who, unless they meet narrow and objectively determined categories of exemptions and excuses, must perform the task. *United States v. Kennedy*, 548 F.2d

608, 611 (5th Cir. 1977). The plaintiff attempted to distinguish the cases relied upon by the court by arguing that the alleged error in each occurred during an earlier phase of the jury selection process than did the alleged error in this case. Following *Branscome*, however, the court held that the random-selection requirement must apply to all stages of the jury selection process.

The plaintiff also argued that Ford could not object to the composition of the jury because it had not proven fraud in the selection process. Duckett asserted that the Alabama Code required Ford to prove fraud in the drawing or summoning of the jurors in order to object to the venire of jurors. However, the court responded that the purpose of section 12-16-80, the portion of the Code upon which Duckett relied, is to prevent the quashing of venires for trivial administrative errors. The court explained that the word "fraud" in the statute encompasses more than just criminal actions. It also includes all acts and omissions which involve a breach of legal duty injurious to others. Therefore, a legal fraud is all that is required by the statute to quash a venire. *Kittle v. State*, 362 So. 2d 1271, 1273-74 (Ala. 1978). The trial court's request for volunteers violated the statute and affected Ford's right to a randomly selected jury. A departure from the statutory scheme that directly affects the random nature of selection establishes a substantial violation independently of the departure's consequence in a particular case.

In the absence of a statutory provision permitting juror self-selection based upon a given juror's willingness to serve for an extended period of time and because only court officials – not jurors themselves – are permitted to excuse a juror, the court reversed the lower court's denial of Ford's motion for a new trial and remanded the case for a new trial.

CHOICE OF LAW CLAUSE IS UNENFORCEABLE

Schnuerle v. Insight Commc'ns Co., ____ S.W.3d ____ (Ky. 2010).

FACTS: Plaintiffs were Kentucky residents and customers of Insight Communications, a broadband cable Internet provider. In order to receive service, Insight required customers to enter into a service agreement that contained numerous provisions, including an arbitration clause and a choice of law clause. The choice of law clause provided that New York law would apply to the construction, interpretation, and enforcement of the Service Agreement.

In the spring of 2006, Insight upgraded its high-speed

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Internet service. Because of the upgrade procedures, many Insight customers experienced service outages for varying lengths of time. Those outages generated a high volume of calls to Insight's customer service department, which resulted in long wait times for customers to receive assistance. The Plaintiffs alleged that once they did get through, they received false and misleading information concerning the service interruption. Plaintiffs brought a class action suit. Insight moved to dismiss the suit and compel arbitration pursuant to the mandatory arbitration clause. In deciding whether the arbitration agreement was enforceable, the circuit court declined to apply New York law and instead applied Kentucky law.

HOLDING: Affirmed.

REASONING: The court first discussed older case law that held that the traditional rule regarding choice of law was that the validity of a contract was determined by the law of the state in which it was made. *Breeding v. Mass. Indem. & Life Ins. Co.*, 633 S.W.2d 717, 719 (Ky. 1982). However, the modern test is to examine which state has the most significant relationship to the transaction and the parties. The court referred to the modern test as "the grouping of contacts doctrine". The court reasoned that the modern test advances justice, fairness, and the best practical result by giving the forum with the most interest in the problem paramount control over the legal issues arising out of a particular factual context. The court applied the modern test and found that the Plaintiffs, the Internet equipment, the Internet service provided, and the relevant operating area were all located in Kentucky. The customers executed the agreements in Kentucky, Kentucky had a substantial interest in the protection of its residents in the area of commercial transactions, and one of the principal claims arose under the Kentucky Consumer Protection Act. Kentucky had the greater interest and the most significant relationship to the transaction and the parties. New York had no discernible connection or interest in the subject matter of the litigation.

OPTION TO CUSTOMIZE SOFTWARE DOES NOT MAKE IT A SERVICE RATHER THAN A GOOD

Surplus.com, Inc. v. Oracle Corp., ___ F.Supp. 2d ___ (N.D. Ill. 2010).

FACTS: Surplus.com, Inc. ("Surplus") purchased a software platform from Siebel Systems, now Oracle Corporation, that could be developed to work within the company's specific needs by a third-party developer Oracle directed Surplus to use. Surplus alleged that the software was never fully developed as requested and Oracle provided no assistance in resolving the matter as well as not providing the updated 7.0 software version Surplus was entitled to under the warranty. Surplus claimed that because the software was not operational "out of the box" and would require extensive development, the sale was actually for intellectual property rights to a developing platform, making it a sale of a service and not a good so the 4-year statute of limitations under UCC section 2-715(1) did not apply to the claim. Oracle filed a motion to dismiss on grounds that the sale was for a good, and the 4-year UCC statute of limitation applied.

HOLDING: Oracle's motion to dismiss was granted with prejudice and Oracle's motion to strike was denied as moot.

REASONING: The court stated that in cases of mixed agree-

ments the primary purpose of the sale would be the deciding factor to determine if the agreement was for a good or a service. If the primary purpose was a sale of a good, then the UCC applied.

The court broke down the facts of the agreement to analyze if the labor was the main element of the agreement as alleged by the plaintiff. The purchase was for a software program that came with Software License and Services Agreement and End User License and Services Agreement. Oracle provided a return warranty and maintenance policy that included updated copies of the software. The court noted that, even though the plaintiff was correct in showing the Illinois Retailers' Occupation Tax Act did not recognize the software at issue to be a UCC good, that information was irrelevant because the relevant information pertained to the agreement between the two parties, not the item itself. The court concluded even in a light most favorable to Surplus, labor and customization was only incidentally involved, the agreement was for sale of a good, and the UCC statute of limitations applied.

LOTTERY WINNINGS ARE ASSIGNABLE AND MAY BE SUBJECT TO SECURITY INTEREST

Texas Lottery Comm'n v. First State Bank of DeQueen, 325 S.W.3d 628 (Tex. 2010).

FACTS: After winning the Texas Lottery, Cletius Irvan ("Lottery Winner") assigned his two final annual installments to First State Bank of DeQueen ("Assignee") as part of a financial arrangement to pay a bank debt he owed. Assignee notified the Texas Lottery Commission ("Commission") of the assignment and filed an application to register the Arkansas judgment approving the repayment arrangement as required by the Texas Lottery Act. The Commission refused to recognize the Arkansas judgment as valid and notified Assignee of its intention to make the final prize payments to Lottery Winner. Assignee filed suit for declaratory judgment arguing that the Lottery Act's anti-assignment provisions for lottery prizes were ineffective because they conflicted with the secured transactions article of the Texas Uniform Commercial Code, which treats all winnings as assignable accounts. The trial court granted Assignee's partial summary judgment motion finding that the anti-assignment provisions of the Lottery Act ineffective to the extent they restrict or prohibit assignment of prize payments and required the Commission to make the payments to Assignee. The Commission appealed and the Court of Appeals affirmed the trial court's judgment.

HOLDING: Affirmed.

REASONING: The UCC's permissive assignment of lottery winnings controlled over the anti-assignment provisions in §466.406 and §466.410 of the Texas Lottery Act. Under the UCC, lottery winnings are accounts and are assignable, but the Texas Lottery Act prohibits assignment of the last two prize installments. The

The Lottery Act permits a person to assign the right to receive prize payment, but defines "person" to include legal entities such as corporations and organizations.

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UCC also provides that a rule of law, statute, or regulation that prohibits or restricts an assignment of a prize won in a state lottery is ineffective. However, Section 9.201 of the UCC carves out an exception: a rule of law establishing a different rule for consumers will control in a conflict.

The Texas Supreme Court sought to determine whether the consumer protection exception applied by looking to the language of each statute. The Lottery Act permits a person to assign the right to receive prize payment but defines “person” to include legal entities such as corporations and organizations. The Lottery Act’s use of the term “individual” in some sections while using the term “persons” in others indicated to the Court that the Legislature intended to make a distinction. The Texas Supreme

Court regarded the use of the term “person” in the Texas Lottery Act’s anti-assignment provisions as an indication that the restriction was not specifically directed at or limited to individuals, but included entities that were not consumers. Nothing in the Act indicated the assignment provisions only applied when an individual purchased a lottery ticket for specific purposes. As such, the Lottery Act did not set out a rule of law applicable to consumers. Because the UCC’s secured transaction provision allowing for the assignment of the lottery winnings controlled over the Texas Lottery Act’s anti-assignment provision, the Commission was required to honor Assignee’s security interest in the assigned winnings.